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DIGEST OF OTHER RECENT VIRGINIA DECISIONS.

(Head notes prepared by M. P. Burks, State Reporter.)

BIG STONE GAP IRON CO. v. KETRON.—Decided at Richmond, November 19, 1903.—Absent, *Buchanan, J.*:

1. **MASTER AND SERVANT**—*Safe place—Risks incident to service.* A person who voluntarily enters the service of another assumes all the risks usually incident to such employment and is presumed to have contracted with reference thereto. In the case at bar the risk was of this character, and was open and obvious.

2. **MASTER AND SERVANT**—*Employment of surgeon—Duty of master.* If a master assumes the responsibility of employing a surgeon to attend his servants, he must use reasonable care in the selection of the surgeon. The presumption is that the master discharged his duty, and the burden is on the servant to prove negligence in the selecting and continuing an unfit surgeon.

3. **MASTER AND SERVANT**—*Incompetent surgeon employed by master—Liability of master.* To hold a master liable for the incompetency of a surgeon employed by him to attend his servants but who is paid by monthly contributions from the servants' wages, it must be alleged and proved that the injury complained of resulted from the incompetency of the surgeon, and further that there was a want of reasonable care in his selection, or that he was retained in service after actual notice of his unfitness, or proof of such acts of negligence as would have affected the master with notice had he exercised due oversight and supervision. The act complained of may of itself be sufficient to establish the incompetency, but not the master's knowledge thereof.

4. **EVIDENCE**—*Competency of surgeon—Registration as a physician.* Whether a surgeon is registered as a physician in the clerk's office of the county court of the county in which he practices is immaterial on an issue involving his competency as a surgeon.

VENABLE & BAYS v. STAMPER.—Decided at Richmond, November 19, 1903.—Absent, *Buchanan, J.*:

1. **SPECIFIC PERFORMANCE**—*Contract indefinite—Case in judgment—Adequate remedy at law.* A court of equity will not decree the specific performance of a contract to convey a tract of land where the terms of the contract are indefinite. In the case in judgment, an aunt wrote to her nephew in Missouri that if he would return to Virginia she would purchase a farm and live with him, requiring only her board and lodging, and that when she was "done with the farm" would give it to him. The nephew, on the faith of this promise, abandoned a job as a day laborer in Missouri and came to Virginia and married, and entered into the possession of the farm, cultivated it, received all the rents and profits from it, but incurred no costs,

made no improvements and did nothing in respect to it except expend some money and labor upon it in the ordinary course of husbandry. The aunt remained with him less than two years and then becoming dissatisfied left him, and afterwards conveyed the land to another.

Held: If any damage has been shown, it may be compensated in an action at law, and the contract will not be specifically enforced in equity.

ZIRCLE V. SOUTHERN RAILWAY CO.—Decided at Richmond, November 19, 1903.—Absent, *Buchanan, J.*:

1. RAILROADS—*Branch roads—Consent of stockholders.* Under the provisions of Acts of Assembly, 1897-8, p. 172, the consent of the stockholders of a railroad company is not necessary to authorize the president and directors of the company to construct a branch road of less than five miles in length.

2. PUBLIC USE. Where a use is public a trust attaches to the subject condemned for the benefit of the public, of the enjoyment of which it cannot be deprived by the company without a reasonable excuse, and the state retains the power to regulate and control the franchises of the company and to fix rates.

3. RAILROADS—*Eminent domain—Supervision by courts.* The legislature of this state has expressly delegated to railway companies the power of eminent domain. In the exercise of that power they represent the sovereignty of the state, and decide, within certain limitations, what and how much land of the citizen they will condemn for their purposes. Within those limitations, their discretion is practically absolute. Courts may supervise the exercise of that power, but will not undertake to control their discretion in taking property for their use unless there has been a very clear case of abuse of the power.

4. RAILROADS—*Eminent domain—Branch road to industrial enterprise—Private use.* A railway built for the purpose of reaching an industrial enterprise is for a public use, and the company is entitled to exercise the power of eminent domain in acquiring property necessary for its construction, provided the general public has the right to use it. This is true though the industrial company advance the money temporarily for the construction of the road. This is not a taking for a private use.

5. EMINENT DOMAIN—*Legislative function.* The question of the necessity, propriety, or expediency of resorting to the exercise of the power of eminent domain, in the absence of constitutional provision to the contrary, is a legislative and not a judicial function.

RAU V. SHAVER & OTHERS.—Decided at Richmond, November 19, 1903.—*Keith, P.* Absent, *Buchanan, J.*:

1. JUDGMENTS—*Lien—Interest of judgment debtor—Rights of third persons—Lien for purchase money.* If a third person furnishes the money to pay for land which is conveyed to a married woman under a written contract with her husband as her agent by which it is agreed that such third